

2008 Canadian Utility Telecom Annual Conference Regulatory Update



Stephen B. Acker
Fasken Martineau DuMoulin LLP
Suite 1300, 55 Metcalfe Street
Ottawa, Ontario K1P 6L5
Tel: 613-236-3882
Fax: 613-2306423
E-mail: sacker@fasken.com



Outline

1. Industry Canada's 1800 – 1830 MHz Spectrum Policy Consultation
2. CRTC Essential Services Proceeding
3. Application by Bell Canada and other Telecos Seeking Unconditional Forbearance from Regulation for Intra-exchange Dark Fibre
4. Advanced Wireless Services (AWS) Auction
5. The Regulatory Road Ahead



1. Industry Canada's 1800 – 1830 MHz Spectrum Policy Consultation

- Kudos to Industry Canada for its responsiveness and leadership in issuing this consultation (and to UTCC for its foresight in prompting it).
- Puts Canada in an envied position in providing spectrum for smart grid applications.
- Contrast with the situation in the U.S. where the UTC has petitioned the F.C.C. to allow utilities to use the 14-14.5 GHz band (Ku-band) on a secondary basis for critical infrastructure communications.
- Major battle with the satellite industry.
- The road ahead for the 1800-1830 MHz spectrum policy
 - SRSP 301.7
 - Licensing issues
 - Equipment

2. Essential Services Proceeding

- In March, 2008 CRTC released *Telecom Decision CRTC 2008-17*: Revised regulatory framework for wholesale services and the definition of essential service.
- Dealt with wholesale services and facilities provided by incumbent telcos needed by competitors to compete at retail level.
- While contentious and attracting much hype, outcome of proceeding left little changed.
- Few former essential services reclassified as non-essential, and those earmarked for declassification subject to lengthy phase-in of 3 or 5 years.



To Be Considered Essential

A facility, function or service must

- Be required by competitors as an input to provide a retail telecom service.
- Be controlled by a company that possesses upstream market power that it could use to substantially lessen or prevent competition in the retail market; and
- Provide a functionality that would not be practical to duplicate.

Duplicability a Critical Issue

- Telus argument re cable duplication.
- Cable company duplication cannot be generalized to other new entrants.
- CRTC test: ability of a “reasonably efficient competitor” to duplicate a local access facility.
- Result: local loops to be treated as essential services until market conditions change.
- Favorable effect of essential services decision for competitors to ILECs.

Involvement of UTCC in Essential Services Proceeding

- The CRTC Decision established 6 categories of services: Essential service (eg. directories); conditional essential (eg. unbundled local loop); conditional mandated non- essential (eg. pay telephone access lines); public good services (eg. 911); interconnection services (eg. wireless interconnection services); and non-essential subject to phase-out (eg. low-speed competitive digital networks (CDN) transport facilities).
- Latter category of interest to utelcos as providers of low-speed CDN transport facilities.
- DS-0 and DS-1 facilities link the ILECs central offices.
- Outcome positive for utelcos – services are deregulated – but lengthy transition periods mitigates the advantages to utelcos.

3. Application by Bell Canada and other Telcos Seeking Unconditional Forbearance from Regulation for Intra-exchange Dark Fibre

- Application filed by Telcos in April, 2008.
- CRTC decided to forbear from regulating inter-exchange dark fibre in Telecom Decision 2008-31.
- Telcos argue that no distinction between inter-exchange dark fibre and intra-exchange dark fibre.
- Also that they have no market power in this area and forbearance is consistent with the objectives of Canadian telecom policy.

UTCC Position

- UTCC members wish to compete with Telcos in provision of intra-exchange dark fibre.
- Filed response in June, 2008 strongly opposing the application
- Claimed it failed to meet the test for deregulation in s.34 in the *Telecommunications Act*.

Arguments Against

- Applicants ignored framework for forbearance in *Telecom Decision CRTC 2007-35* relating to intra-exchange digital network access services.
- Recognized barriers to competitive high speed intra-exchange services including building access and municipal rights of way.
- UTCC members do not have access to in-building wiring and must negotiate such access and pay market rates.
- Applicants failed to satisfy that they do not have market power. Provided no evidence of competitive rivalry.
- No evidence of comparative inventories of dark fibre among competitors.
- In short, no evidence to show that the competitive condition present in the inter-exchange dark fibre market are also present in the provision of intra-exchange dark fibre.



Outcome

- No decision yet.
- Perhaps in the Fall.

4. Advanced Wireless Services (AWS) Auction

- Most successful Canadian spectrum auction to date.
- Raised \$4.25 billion for 282 AWS licences in tier 2 and 3 service areas across Canada.
- 15 successful bidders of whom 10 are new entrants (including Shaw, Quebecor, Globalive Wireless and Bragg). All must demonstrate Canadian ownership and control before obtaining licences.
- 40 MHz of 90 MHz of AWS spectrum set aside for new entrants in furtherance of more competitive wireless market.
- Likely to be consolidations among regional players to create one or more new national operators.
- Industry Canada has mandated mandatory roaming and tower sharing to promote success of new entrants. Rules being finalized to handle disputes through arbitration.
- May see a much changed mobile phone environment over the next several years.

5. The Regulatory Road Ahead

- No announced CRTC proceedings in telecom.
- May be further applications for forbearance by telcos.
- BPL developments; new ICES rules for access BPL.
- As AWS new entrants gear up, likely to be disputes and arbitrations relating to roaming and tower sharing.
- 1800 – 1830 MHz spectrum policy for utility telemetry will be fleshed out with new technical rules.